THIS OPINION IS NOT A PRECEDENT OF THE TTAB

10 April 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re J & S Innovators, Inc.

_____

Serial No. 78871020

_____

Michael D. Oliver of Bowie & Jensen, LLC for J & S Innovators, Inc.

Tina Brown, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

_____

Before Drost, Taylor, and Wellington, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 27, 2006, applicant, J & S Innovators, Inc. applied to register the term THE SAND ANCHOR (in standard character form) on the Principal Register for goods ultimately identified as "removable plastic apparatus for retaining tables, chairs, sunshades, umbrellas, volleyball poles on a beach" in Class 20. The application identifies the date of first use anywhere and in commerce as January 8, 1994. During the prosecution of the application,

applicant amended the application to seek registration under the provision of Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f).

The examining attorney[1] has refused to register applicant's mark on the grounds that "it is incapable of distinguishing Applicant's goods from those of others pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1), and the rejection of Applicant's claim of distinctiveness because it is insufficient pursuant to Trademark Act Section 2(f), 15 U.S.C. Section 1052(f)." Brief at 1. *See also* TMEP 1209.02 (5th ed. September 2007).

The examining attorney argues that applicant's "proposed mark is a generic or highly descriptive designation of the identified goods." Brief at 3. The examining attorney submitted several types of evidence. First, the examining attorney included definitions of:

> Sand – material made of tiny grains; a substance of fine loose grains of rock or minerals, usually quartz fragments, found on beaches, in deserts, and in soil sometimes as a building material
>
> Anchor – any device that keeps an object in place.

See First Office Action, Attachment.

[1] The current examining attorney was not the original examining attorney in this case.

With her brief, the examining attorney requested that we also take judicial notice of the definition of the word "The," as "adjective indicating one as distinct from another," which we do. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

The examining attorney also submitted the following excerpts from the internet (emphasis added):

> Includes 2 backpack beach chairs, 6" UV coa[ted] umbrella and **sand anchor**.
> www.readyrentals.com

> Rio Sports **Sand Anchor…**
> Product Features
> - **Sand anchor** stops umbrellas from blowing away...
> Product description
> Umbrella **Sand Anchor**. Screws umbrella firmly into the sand…
> Customer Reviews:
> Bought two of these **anchors**, one for us and one for my folks. We had excellent luck with them.
> Amazon.com website

> Anchor Away **Sand Anchor…**
> This versatile **anchor** is your solution for beach umbrellas, fishing rods and other sports anchoring needs. Made with rugged and durable hard plastic to make **anchoring** easy.
> East Coast Surf Supply, ebay.com

> Our **Sand Anchor** holds your beach umbrella perfectly in place and at any angle. Simply twist into the sand and then snap onto the handle with a quick turn of the thumb screw.
> Coolibar website

> Much larger than most beach umbrellas, includes a handy backpack and **sand anchor** that screws into the sand and prevents the umbrella from blowing away.

USimprints.com website

This classic beach umbrella features a frame made of steel. Rugged Sunbrella marine and awning grade 9.25 fabric. Tote carrying bag and **sand anchor**/table sold separately on our website.
Hici Patio Furniture website

Sand Grabber Umbrella **Anchor**
Stops blow away beach umbrellas.
Aubuchon Hardware website

Beach Umbrella **Anchor**
The **anchor** has a wide handle and broad threads making it easy to drive it into loose sand or packed turf.
Beachstuf.com website

Applicant has submitted the declaration of its president, Jim Skarda, which contained the following statements:

- The declarant believes that applicant "was the first company to use the mark THE SAND ANCHOR" for the goods in the application (¶ 2).

- The mark has been in continuous and exclusive use since January 8, 1994 (¶ 3).

- Applicant has spent approximately $140,000 in "advertising and marketing of the products associated with the Mark since it began use of the Mark" (¶ 4).

- Applicant has sold approximately 250,000 units of the product (¶ 4).

- The mark has acquired distinctiveness (¶ 5).

Applicant also points out that it was the owner of a prior registration for the mark THE SAND ANCHOR ("sand" disclaimed) for the identical goods except that the term "plastic" is only found in the pending application's identification of goods.

Finally, we sustain the examining attorney's objection to applicant's inclusion of a list of six trademark registrations in its appeal brief. Not only is it too late to submit this evidence, but also a list of registration numbers and marks, even if it was timely submitted would not be entitled to any weight. *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence") and *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record").

Descriptiveness/Genericness

Because applicant is now seeking registration under Section 2(f), there is no question that its mark is merely descriptive. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the *statute* accepts a

lack of inherent distinctiveness as an established fact") (emphasis in original). Therefore, the immediate question is whether the mark THE SAND ANCHOR is generic. Under *H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc.*, "[t]he critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). The Federal Circuit went on to explain that:

> Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id.

Here, there can be little doubt but that applicant's goods are "anchors" because they are devices that keep objects in place. The evidence clearly shows that these goods are referred to as "anchors." *See, e.g.*, "Sand Grabber Umbrella **Anchor -** Stops blow away beach umbrellas" and "Beach Umbrella **Anchor -** The **anchor** has a wide handle and broad threads making it easy to drive it into loose sand." It is also clear that these anchors are designed to be used in the sand to keep items on the beach from blowing

away. The examining attorney asserts that the identification of goods (removable plastic apparatus for retaining tables, chairs, sunshades, umbrellas, volleyball poles on a beach) "is the class or genus of the Applicant's goods." Brief at unnumbered p. 5. We agree that is a genus of the goods.

"Next, we must determine the relevant public for applicant's goods." *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532, 1536 (TTAB 2007). In this case, where the goods are designed to be used in association with beach umbrellas and similar items, the relevant public would be the general public. The question now is whether members of the relevant public would understand the term THE SAND ANCHOR to refer to that genus. *Marvin Ginn*, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications." *In re Merrill Lynch, Fenner and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). When we look at the evidence, it shows that the public would understand the term SAND ANCHOR to be the name of a product that anchors beach items in particular into the sand. *See, e.g.*, "Includes 2 backpack beach chairs, … umbrella and

sand anchor," "Sand anchor stops umbrellas from blowing away," "Anchor Away Sand Anchor," "Our Sand Anchor holds your beach umbrella perfectly in place and at any angle," "Much larger than most beach umbrellas, includes a handy backpack and sand anchor that screws into the sand" and "Tote carrying bag and sand anchor/table sold separately." The public encountering the term "Sand Anchor" would understand that it is a name for these items that restrain objects from blowing away on the beach.

We add that the definite article "The" is not a significant feature of applicant's mark. *GMT Productions, L.P. v. Cablevision of New York City, Inc.*, 816 F. Supp. 207, 211 (S.D.N.Y. 1993)("[U]se of the word 'the' before an unprotectable mark does not convert an otherwise generic term into a descriptive one"). *See also In re G. D. Searle & Co.*, 360 F.2d 650, 149 USPQ 619, 624 (CCPA 1966) ("[T]he term 'the pill' here functions to identify the product to the public rather than to identify and distinguish appellant's goods from those of others") and *In re The Computer Store, Inc.*, 211 USPQ 72, 75 (TTAB 1981) ("The more likely impression conveyed by the initial 'The,' as applicant has used it, is simply that of limiting the noun, 'store' to the application specified by the accompanying

adjective, 'computer.'" THE COMPUTER STORE did not distinguish applicant's services).

We find that the evidence shows that the examining attorney has made out a prima facie case that the term THE SAND ANCHOR is generic for the identified goods. *See In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987) (When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence"). We disagree with applicant's argument that the examining attorney has not presented clear evidence that the mark is generic. While applicant argues that the examining attorney "has largely relied on competitors' advertisements (Brief at 7), these references are relevant to the issue of genericness. *In re Reed Elsevier Properties Inc.*, 482 F.2d 1376, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007) (LAWYERS.COM held generic):

> Moreover, in determining what the relevant public would understand LAWYERS.COM to mean, the board considered eight websites containing "lawyer.com" or "lawyers.com" in the domain name, e.g., www.massachusetts-lawyers.com, www.truckerlawyers.com, and www.medialawyer.com. It discussed the services provided by these websites in order to illuminate what services the relevant public would understand a website operating under Reed's mark to provide. These websites are competent sources under *In re Merrill Lynch*, 828 F.2d at 1570, and they provide substantial evidence to support the board's finding.

Applicant also argues that it has continuously and exclusively used the term for more than 13 years (Brief at 4), but even a novel way of describing a product was held to be generic. *Clairol, Inc. v. Roux Distributing Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960)(HAIR COLOR BATH generic for a liquid for hair coloring) and *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) ("We agree with the Examining Attorney that if a purchaser were seeking to buy sprinklers for an attic, it would be reasonable to refer to such products as 'attic' sprinklers. The fact that applicant may be the first or the only one using ATTIC in connection with sprinklers is not dispositive"). *See also In re Helena Rubinstein, Inc.*, 410 F.2d 438, 161 USPQ 606, 609 (CCPA 1969).

Therefore, we conclude that the examining attorney has shown that the term THE SAND ANCHOR is generic for the identified goods.

Acquired Distinctiveness

It has long been held that if a term is generic, no amount of evidence of acquired distinctiveness can establish that the mark is registrable. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 964 (Fed. Cir. 1985). If applicant's term is only highly descriptive, we will consider applicant's evidence that it

submitted to determine if its mark has acquired distinctiveness. Here, applicant has the burden of proving that its mark has acquired distinctiveness. *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954)("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"). "[L]ogically that standard becomes more difficult as the mark's descriptiveness increases." *Yamaha Int'l*, 6 USPQ2d at 1008.

Applicant's witness reports that it has been using the mark for more than thirteen years, but an allegation of long use of the term does not convert a generic term into a non-generic term. The witness also reports that it has sold approximately 250,000 units and spent approximately $140,000 on advertising over that period. These sales and advertising figures are relatively modest and we point out that there is no context for the these figures. *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007 ("The sales figures for 14 years, standing alone and without any context in the trade, are not so impressive as to elevate applicant's highly descriptive designation to the status of a distinctive mark"). Even if these sales and advertising figures were more significant, the board has recently pointed out that:

> Applicant's long use and revenues suggest that applicant has enjoyed a degree of business success. Nonetheless, this evidence demonstrates only the popularity of applicant's services, not that the relevant customers of such services have come to view the designation LENS as applicant's source-identifying service mark. *See In re Bongrain International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997).

In re Lens.com Inc., 83 USPQ2d 1444, 1448 (TTAB 2007).

Finally, we add that the fact that applicant at one time owned a now-expired registration for the same mark for nearly identical goods does not show that its mark has acquired distinctiveness. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1048 n.2 (TTAB 2002):

> Thus, applicant's expired registration merely constitutes evidence that the registration issued, *see, e.g., Sunnen Products Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987), but any benefits conferred by the registration, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), were lost when the registration expired.

Accord In re Piano Factory Group Inc., 85 USPQ2d 1522, 1527 (TTAB 2006) (parenthetical omitted) ("Furthermore, the fact that the mark "VOSE & SONS" was at one time registered on the Principal Register does not justify registration in light of the substantial evidence herein as to the primary significance of the term "VOSE" as a surname").

Therefore, we conclude that applicant's evidence falls far short of demonstrating that its mark has acquired

distinctiveness, even if the mark were ultimately determined to be merely descriptive for applicant's goods.

Conclusion

Applicant's term THE SAND ANCHOR is generic for the goods recited in the application and, in the event that the term is not generic, applicant has not demonstrated that its mark has acquired distinctiveness.

Decision: The refusal to register is affirmed.